

## FEDERAL MARITIME COMMISSION

**PETITION OF THE ASSOCIATION OF  
BI-STATE MOTOR CARRIERS, INC. TO  
INVESTIGATE TRUCK DETENTION  
PRACTICES OF THE NEW YORK  
TERMINAL CONFERENCE AT THE NEW  
YORK/NEW JERSEY PORT DISTRICT**

Petition P3-02

Served: February 20, 2004

### ORDER

On November 18, 2002, the Association of Bi-State Motor Carriers, Inc. ("Bi-State"), an organization comprised of approximately 40 members of various small- to medium-sized independent trucking companies that provide the majority of local drayage to the New York/New Jersey Port District ("the Port"), tiled a petition before the Commission. Bi-State avers that the marine terminal operator members ("MTOs") of the New York Terminal Conference ("NYTC") are in violation of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(d)(1), for failing to establish, observe and enforce just and reasonable truck detention practices and regulations at the Port. Bi-State alleges that the NYTC's truck detention regulations in its tariff have been deliberately crafted and executed to avoid the fair calculation of truck detention penalties, which are compensation for truckers who experience excessive waiting at the terminal. Bi-State requests that the Commission initiate an

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investigation of the NYTC's truck detention activities under section 1 l(c) of the Shipping Act, 46 U.S.C. app. § 1710(c). Bi-State also requests that the Commission reconsider its 1994 decision to eliminate truck detention penalty requirements for the Port of New York from its regulations. Free Time and Demurrage Charges on Import Property At the Port of New York; Truck Detention at the Port of New York, 59 Fed. Reg. 13459 (Final Rule 1994).

The NYTC is comprised of MTOs who collectively set rates, charges and service conditions under agreements filed with the Commission pursuant to the Shipping Act. The NYTC files and publishes a terminal tariff for its members under Marine Terminal Schedule No. 011408 ("Tariff"), which includes the rates, charges, rules, regulations and practices applicable to the loading and unloading of cargo, as well as the interchange of chassis and containers at the Port.

On November 20, 2002, the Commission invited interested parties to file comments in response to the Petition. Pursuant to a subsequent extension of time, the comments were due by February 3, 2003. Five comments in opposition to the Petition were filed. Fifty-four comments in support of the Petition were filed.

For the reasons set forth below, the Commission denies the Petition for failure to establish sufficient facts to warrant the initiation of an investigation under Rule 69 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.69. The Commission also denies Bi-State's request for reconsideration of its 1994 decision in Free Time and Demurrage Charges on Import Property At the Port of New York; Truck Detention at the Port of New York, 59 Fed. Reg. 13459 (Final Rule 1994), to

eliminate truck detention penalty requirements from the regulations.

### **HISTORY OF TRUCK DETENTION RULES AT THE COMMISSION**

From the 1960s to the 1990s, the Commission promulgated truck detention regulations (“the Rules”) directed specifically at the Port of New York in an effort to alleviate the excessive and unusual delays caused by MTOs in the handling and interchange of freight between ocean and motor carriers. The Rules grew out of a 1963 Commission-initiated investigation and adjudicatory proceeding involving the NYTC. Truck Lighter Loading and Unloading Practices at New York Harbor, 6 S.R.R. 138 (I.D. 1965), aff’d, Truck and Lighter Loading and Unloading Practices at New York Harbor, 9 F.M.C. 505 (1966). From the investigative findings, the Commission determined that given the unique circumstances at the Port, a provision of the NYTC’s tariff disclaiming all liability for motor carrier delays from port congestion was unreasonable and in violation of section 17 of the Shipping Act of 1916, 46 U.S.C. § 816. NYTC was ordered to come into compliance with the requirements of section 17 by modifying its tariff to include a truck detention penalty provision. Id., aff’d sub nom., American Exnort-Isbrandtsen v. Federal Maritime Comm’n, 389 F.2d 962 (D.C. Cir. 1968) (“American Exnort - Isbrandtsen I”). The Commission rejected NYTC’s proposed provision and ordered it to adopt the Rules promulgated by the Commission, or to show cause why they should not be adopted. Truck Lighter Loading and Unloading Practices at New York Harbor, 12 F.M.C. 166-167 (1969). In NYTC’s appeal, the D.C. Circuit upheld the order and concluded that Congress had expressly authorized the Commission to promulgate and enforce

reasonable regulations and practices related to the receiving, handling, storing or delivering of property at harbor terminal facilities. American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Comm'n, 444 F.2d 824, 829 (D.C. Cir. 1970) (“American Exnort-Isbrandtsen II”).

The Rules were codified in the Commission’s regulations under the 1916 Act, and continued under the 1984 Act at 46 C.F.R. Part 530, Truck Detention at the Port of New York. In 1992, the Commission undertook a comprehensive review of its regulations to eliminate outdated provisions. Public comment was solicited on whether the transportation conditions that originally prompted the need for Part 530 had changed to the extent that truck detention regulations at the Port had become unnecessary. Free Time and Demurrage Charges On Import Property At the Port of New York: Truck Detention at the Port of New York, 57 Fed. Reg. 24006 (Notice of Inquiry 1992).<sup>1</sup> As a result of this inquiry, the Commission developed a proposed rule advocating that modern containerization and technological advancements had altered marine terminal operations in such a way that removal of the Port’s truck detention regulations was justified. Free Time and Demurrage Charges On Import Property At the Port of New York: Truck Detention at the Port of New York, 57 Fed. Reg. 47025, 47026 (Proposed Rule 1992). In the end, only one association submitted comments in support

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<sup>1</sup>Free Time and Demurrage Charges On Import Property At the Port of New York refers to 46 CFR Part 525, Free Time and Demurrage Charges on Import Property Applicable to All Common Carriers by Water, regulations created from other findings in the same investigation of the Port of NY. As such, while not related to truck detention practices, the Commission deliberated the regulations’ utility together with Part 530.

of keeping the regulations. Because those comments failed to provide specific examples of benefits of the rule or any evidence of unique circumstances at the Port that would justify continued special regulation, the Commission determined to remove the regulations in 1994. Free Time and Demurrage Charges on Import Property At the Port of New York: Truck Detention at the Port of New York, 59 Fed. Reg. 13459 (Final Rule 1994).

### **POSITIONS OF THE PARTIES**

#### **A. The Petition**

##### **1. Section 10(d)(1)**

Bi-State requests that the Commission investigate the Port's practices and regulations regarding the handling and interchange of cargo and equipment of ocean and motor carriers to determine whether they violate section 10(d)(1) of the Shipping Act.<sup>2</sup> Bi-State asserts that the current practices of the NYTC are patently unreasonable and that the Commission should order the NYTC to modify the provisions of its Tariff concerning truck detention penalties. Petition at 1-2, 16-17, 19, 26-28. Bi-State also requests that the Commission reconsider the promulgation of truck detention rules to provide for nationwide uniformity in the regulation of marine terminal operations. Id. at 23, 25-26.

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\*That section reads:

No marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

The Petition articulates Bi-State's concerns regarding the burdens of doing business at the Port due to heavy port congestion. Bi-State asserts that the issue of port congestion is rooted in the ineffective self-regulation of NYTC members and their inability to resolve the situation by enacting reasonable truck detention policies. Petition at 4. The resulting problems of excessive waiting time and costs, Bi-State alleges, have made the conditions at the Port unworkable for its truckers. Id. at 3. Moreover, the public interest is adversely affected by port congestion due to economic losses to the import-export community and environmental damage from air pollution from idling trucks, Id. at 4, 21, 23, 26. Bi-State claims that it has repeatedly attempted to persuade NYTC to establish just and reasonable regulations, but believes that the NYTC will never do so without Commission intervention. Id. at 16. It argues that only the Commission can correct the alleged problems and deal with the underlying commercial issues and industry groups effectively. Id. at 23.

## 2. Statutory authority

According to Bi-State, Congress preserved the Commission's jurisdiction over MTOs under section 10 of the Shipping Act of 1984, 46 App. U.S.C. 1709. Petition at 20. Bi-State explains that this long-standing authority has its roots in section 17 of the 1916 Act<sup>3</sup>, where Congress first expressly

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'Section 17 of the 1916 Act provided:

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or  
(continued...)

granted the Commission the authority to promulgate and enforce regulations related to the receiving, handling, storing or delivering of property at harbor terminal facilities. Petition at 20. Because the language of section 10 of the 1984 Act regarding prohibited acts retains substantially similar language to section 17 of the 1916 Act, Bi-State reasons that the Commission is still charged with enforcement authority over the unreasonable and unjust practices of MTOs. Ibid.

### 3. Concerns with national uniformity

Bi-State points to recent California legislation aimed at air pollution reduction by limiting the amount of time that terminals can allow trucks to idle outside or inside the terminal facility. The California State Assembly has fashioned the law to provide for the mitigation of violations through a series of incentives for MTOs that amount to more efficient terminal operations, according to Bi-State. Petition at 24-25. Bi-State views state-initiated legislation as potentially damaging, with “provisions that could murky the waters of port congestion regulation.” Id. at 21. Bi-State asserts that these initiatives exist solely due to the absence of federal regulations, and that it is imperative that the Commission “reassert national leadership and ensure uniformity in the matter of terminal operations and the obligations of MTOs in discharging their duties with regard to the public interest.” Id. at 25. Bi-State emphasizes that the

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(...continued)

delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.



Commission should assert itself as the “leading forum to deal with terminal issues,” especially in light of national security concerns. Id. at 26.

#### 4. Relief Requested

Upon a finding of Shipping Act violations, Bi-State asks that the Commission:

- (1) Order the NYTC to modify the computation of time provision in the Tariff to include a reasonable calculation that includes the queue waiting time experienced by truckers outside the terminal point of processing and more accurately reflects a truck’s arrival time at the terminal.
- (2) Order the NYTC to modify the free time provision in the Tariff to provide for a reasonable period of time before truck detention penalties begin to accrue.
- (3) Order the NYTC MTOs to cease and desist from the practice of requiring truckers to engage in repositioning equipment without compensation from the terminal.
- (4) Order the NYTC to remove from its Tariff provisions that permit exclusions from the calculation of time relating to terminal delays, unavailability of equipment, and equipment repositioning, maintenance or repair.

- (5) Order the NYTC to modify the free time provision in its Tariff to distinguish free time under “typical circumstances” from free time when roadability issues are present.
- (6) Order the NYTC to cease and desist from its practice of tendering defective equipment to truckers upon arrival at the terminal, to maintain a pool of road-ready equipment sufficient to meet the needs of truckers during the daily operations, and to modify its Tariff to include delays from defective equipment to be calculated into the truck detention penalty.
- (7) Order the NYTC to modify the provisions in its Tariff that allow for additional free time for loading and unloading cargo/chassis regardless of roadability issues.

B. Comments opposed to the Petition

Five comments were filed in opposition to the Petition.

The NYTC is comprised of three member companies which operate four of the seven container marine terminals located in Ports Newark and Elizabeth, none of which is the largest in either port. Its members handle less than half of the containerized cargo moving through the Port. NYTC Comments at 2. NYTC contends that the Commission’s past experience with prescribing the content of marine terminal tariffs was based on authority in the 1916 Act that does not appear in the 1984 Act. Since the abolition of the 1916 Act, NYTC argues, the Commission no longer has the authority to require the filing of

tariffs by marine terminals nor to dictate their contents. Id. at 5. Under the present Shipping Act, as amended by OSRA, NYTC explains that Congress did not require MTOs to make their rate schedules available to the public and did not authorize the Commission to prescribe the content of terminal operator rate schedules or even to require that there be one. Id. at 6. NYTC concludes by asserting that the Petition fails to supply the necessary facts to support a violation of the Shipping Act, and that the Petitioners should file a complaint if they wish to proceed. Id. at 18.

The United States Maritime Alliance, Limited (“USMX”) is an association of ocean carriers, stevedores, terminal operators and port associations involved in protecting the interests of management groups in labor relations affecting longshore activities. This association negotiates and administers the terms of the master contract with the International Longshoremen’s Association, AFL-CIO. USMX Comments at 2.

USMX contends that port congestion is not created solely by MTOs. It cites to a 1999 report to Congress on the U.S. marine transportation system produced by former Secretary of Transportation Rodney E. Slater, which finds that port congestion is the result of a combination of factors: increased demand, deficient intermodal connectors, competing interests in port facilities and environmental factors. Id. at 4. USMX points to “aggressive terminal improvements” being made in the Port to ameliorate port congestion and trucking problems. Id. at 4-5. It asserts that MTOs are sympathetic to motor carrier frustration and asserts that the delay problems are best attributed to construction projects that will in the long run improve port efficiency. Id. at 5.

Universal Maritime Service (“UMS”), an MTO at Port Elizabeth in New Jersey and an NYTC member, argues that the Petitioners have failed to meet the standard of proof required of parties petitioning for an investigation under Rule 69 of the Commission’s Rules of Practice and Procedure. UMS Comments at 2. UMS asserts that port congestion is attributable to an increase in cargo volume (from 2001 to 2002, UMS reports that it experienced a sharp increase in container moves from 393,000 per year to 586,000 per year), port construction projects, and labor shortages, not to truck detention rules. Id. at 3-4. UMS provides information regarding its investments to increase capacity, expand hours of operation and develop a phone/internet-based scheduling system for truckers to effectively deal with this surge. Id. at 3-4.

UMS argues that the truck detention practices are not unjust or unreasonable under the standards of review of section 10(d)(1). Rather, UMS explains, these practices are “some of the most generous in the country” because the payment of track detention exists only at the Port. Id. at 5-7. UMS contends that truckers are not the customers of the terminals; rather, the carriers are. It explains that trucking companies contract with the shipper, carrier or shipper/carrier agents, and that the dispatch of trucks to pick up cargo from any terminal is the responsibility of the shipper or consignee, not the MTO. Id. at 5. Finally, UMS also suggests that a complaint proceeding would be a more appropriate way for the Commission to handle the specific, localized issues that Bi-State seeks to raise. Id. at 9.

Port Newark Container Terminal (“PNCT”), which leases and operates its terminal from the Port Authority of New York and New Jersey, is also a member of the NYTC. PNCT argues that the alleged commercial conditions and port congestion

outlined in the Petition are a nationwide problem not unique to New York, but rather to busier terminals in busier U.S. ports, a point supported by Bi-State's evidence. PNCT Comments at 7. PNCT contends that some of Bi-State's claims are simply misdirected, as MTOs have no control over issues such as truckers' compensation or the availability and condition of containers. Id. at 4-5. As for the issues that MTOs can control, PNCT claims that it has been working diligently to mitigate congestion problems through its massive civil works program designed to modernize and improve terminal infrastructure and equipment. Id. at 3.

Regarding Bi-State's allegation that the omission from the Tariffs calculation of time spent by truckers waiting outside of the gate is unreasonable and in violation of the Shipping Act, PNCT claims that it is certainly reasonable from the standpoint of liability, security, monitoring and control not to treat a truck as having arrived at a marine terminal until it has been processed at the terminal gate. As for time spent in line by truckers accessing off-site facilities for chassis/container return/pickup, PNCT explains that the use of off-site storage facilities is necessary to avoid terminal congestion and possible gridlock caused by the accumulation of empty containers and excess equipment. PNCT Comments at 14.

After an extensive review of the history of truck detention rules, PNCT asserts that the Commission's authority to supply Bi-State's requested relief ended upon the elimination of the second sentence of section 17 of the 1916 Act. Id. at 23. While PNCT contends that the Petition fails to raise a single, relevant Shipping Act issue, PNCT submits that Bi-State should file a complaint pursuant to the Commission's regulations if its

members believe they have a valid claim against the NYTC. Id. at 24.

Finally, the Port Authority of New York and New Jersey submits its concern with the efficient functioning of its leased facilities and the level of service provided to the shipping community. It argues that the congestion is attributable to an unanticipated rise in cargo activity, continued labor shortages, and construction projects. NY & NJ Port Authority Comments at 1. The Port Authority notes that all port users share the goal of reducing congestion, and that its MTOs have extended operating hours and modified operational procedures to deal with the problems. Id. The Port Authority asks that the Commission proceed cautiously in this matter and not adversely affect the Port's competitive position among other ports. Id. at 2.

#### C. Comments supporting the petition

Fifty-four comments were filed in support of Bi-State's petition.

The New York/New Jersey Foreign Freight Forwarders and Brokers Association ("NY/NJ FFFBA"), comprised of 160 ocean freight forwarders, NVOCCs and customhouse brokers serving the Port area, contends that port congestion is due to the failure on the part of MTOs to make containers and equipment available to truckers servicing the Port. NY/NJ FFFBA Comments at 2. In expressing its concern about increased trucking charges for the forwarding and import/export communities due to excessive delays, it alleges that MTOs are unfairly placing the burden of their shortcomings on all other components of the logistics and transportation chain. Id. at 2.

The NY/NJ FFFBA claims that the NYTC Tariff does not provide incentives for the effective processing of cargo, and that the responsibility to enhance the Port's efficiency lies solely on NYTC members. Id. at 2-3. It asserts that the Commission should address the difficult commercial implications of port congestion, the impact of the NYTC tariffs contribution to congestion at the Port, and the resulting delays to the importer/exporter and freight forwarder community. Id. at 3.

Representative Mike Ferguson of New Jersey articulates his broad support for Bi-State's claims in a letter that highlights a good portion of the issues presented in the Petition. He specifically notes the importance of minimizing environmental pollution caused by unnecessary truck idling and voices his concerns regarding compromised homeland security due to the inefficient flow of containers at the port. Ferguson Letter at 1. He also suggests that port congestion causes substantial hardships such that many truckers, paid on a per-move basis, are unable to make a decent living not only servicing the Port, but also other ports around the country. Ibid.

Mr. Ferguson argues that the Commission has adequate statutory authority under section IO(d)(1) to investigate the matter and rectify the problems associated with port congestion and the resulting truck detention problems. Id. He urges the FMC to investigate this matter of urgency to the shipping public and constituents in his district. Id. at 2.

Representative Robert Menendez of New Jersey expresses similar concerns about the environmental and financial impact of idling trucks at U.S. ports and voices his dismay regarding the poor air quality in the NY/NJ port area exacerbated by emissions from idling trucks. He writes that port congestion has significant

economic consequences amounting to losses for truckers who work in the Port. Menendez Letter at 1.

The Commission also received 51 comments from various trucking companies supporting the Petition and complaining that the Port's practices are inefficient and harm commerce. Most of the comments are in identical form letters, three versions of which were submitted. None provides any detailed accounts of personal experience to substantiate their complaints, nor do the commenters assert that they have been injured in any particular way by the truck detention practices at issue.

## **DISCUSSION**

### **A. Factual Record**

#### **1. Investigation of 10(d)(1) Violations**

Rule 69 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.69, requires that all petitions for relief clearly state the facts the petitioner relies upon to show that violations of the Shipping Act are likely to have occurred and that an investigation is warranted. Neither Bi-State, nor any of the commenters, has produced sufficient evidence to support initiating an investigation into the alleged section 10(d)(1) violations.

Bi-State cites only to Commission findings dating back to the original truck detention investigations and the American Export-Isbrandtsen cases of the 1960s and early 1970s rather than providing economic analyses or other studies to corroborate each of its claims. Petition at 19-22. Bi-State concedes that these pre-containerization holdings and the resulting regulations do not



take into consideration the technological advancements of the last decade, but asserts that they clearly establish that “port congestion is against public policy; that port congestion decreases the efficiency of terminals; that port congestion increases costs to importers, exporters, and truckers; and that the MTOs require incentives to create efficiency, such as reasonable and just Track Detention regulations, to ease the congestion caused by MTOs.” Petition at 18. While Bi-State has accurately recited a portion of these holdings, this precedent more correctly provides, in relevant part, that given the unusual truck delays caused by marine terminals in the Port in the 1960s, it was unreasonable for NYTC to omit truck detention rules from its Tariff, and that it was appropriate for the Commission to order and promulgate such rules. Truck and Lighter Loading and Unloading Practices at New York Harbor, 6 S.R.R. 138 (I.D. 1965), aff’d, 9 F.M.C. 505 (1966); ~~American Export~~ Isbrandtsen I at 968; American Export-Isbrandtsen II at 829. However, Bi-State fails to demonstrate how these cases support its current allegations.

While Bi-State asserts great hardship on the shipping public due to NYTC’s alleged actions and omissions, it provides no probative evidence to show why the current truck detention practices should be considered unreasonable under the Shipping Act in the present commercial climate. More specifically, Bi-State contends that the problem of port congestion is rooted in NYTC’s inability to enact reasonable truck detention policies. As evidence of this contention, Bi-State offers Journal of Commerce articles; two affidavits, one from Bi-State’s Executive Director, Mr. Dick Jones, and the other with signatures of 18 out of 40 Bi-State members; copies of “terminal operation reports”; photographs of trucks alleged to be in queue at various terminals at the Port; and truck traffic pattern notices from PNCT

Management. None of these items proves that the NYTC's rules and practices are the actual cause of congestion, or that increased penalty payments to truckers would lead to more efficient terminal operations.

The Journal of Commerce articles submitted make no mention of truck detention practices or rules, and would appear to undermine the Petition. They highlight the multifaceted issue of port congestion and show how the terminals are trying to mitigate the problem. The affidavits submitted similarly fail to corroborate any of Bi-State's allegations. For example, in the affidavit of Mr. Jones, he states that he "routinely encounter[s] the poor conditions at the NYTC terminals" and that the "Terminal Operations Reports" from the various terminals demonstrate that truckers' waiting time is excessive. Petition at 7, Jones Affidavit Attachment C at 2. However, these reports consist of information gathered only for two different days at two different gates at the terminal. Mr. Jones states that the reports are only a "snapshot of the congestion problem," but without supporting documentation, e.g., accompanying port traffic studies, analyses, or quarterly terminal operations reports, it is difficult to extrapolate the dramatic problems alleged by Bi-State. Petition/Jones Affidavit Attachment C at 3. The joint Bi-State affidavit is also problematic because, like the Petition, it only contains allegations and unsubstantiated information. For example, the members provide estimates on the average wait time during the last year at each terminal ("[F]or five (5) out of every (10) trucking transactions . our truckers wait in the queue outside the terminal gate before reaching the processing gate . . . from a minimum of thirty (30) minutes up to three (3) hours"), yet they provide no evidence to show how they arrived at such an estimate. Petition/Bi-State Joint Affidavit Attachment D at 2. In short, the affidavits serve as an extension of Bi-State's

allegations and provide little factual insight into the truck detention situation at the Port. The remaining evidence is similarly unconvincing.

Bi-State has not provided the Commission with adequate evidence to substantiate the alleged Shipping Act violations presented in the Petition. The limited precedent cited by Bi-State is not persuasive, as the cases it cites addressed conditions at the Port of New York in the 1960s, and those conditions eased with the introduction of containerized handling operations. Other than Bi-State's Petition, the Commission has no information pointing to grave truck detention problems in the Port such that Commission intervention would be necessary.

Therefore, the Commission has determined to deny Petitioner's request for an investigation. This denial does not preclude Bi-State from filing a complaint with the Commission if it wishes to do so.

## 2. The Rearomulaation of Truck Detention Rules

Bi-State also requests that the Commission reconsider the promulgation of truck detention regulations. Petition at 23. Bi-State does not address relevant Commission findings from the 1990s that serve as the crux of this matter. In its rationale for removing the rules, the Commission explained that the shipping public's comments failed to demonstrate: 1) how the rules were useful in addressing port congestion; 2) why the Commission was better suited than local authorities to address and resolve delays; and 3) how the Port continued to suffer from unique circumstances, which from a regulatory perspective would distinguish it from other large ports. Free Time and Demurrage Charges on Import Property At the Port of New York; Truck

Detention at the Port of New York, 26 S.R.R. 748 (1993); 26 S.R.R. 1268 (1994). The Commission ultimately found that the retention of the regulations was unjustifiable without detailed factual support on these points. Ibid.

Here, Bi-State submits nothing that would lead the Commission to a different conclusion. It states that the present truck detention rules/payment calculations must be altered to provide MTOs incentives to create efficiency, but there appears to be no evidence showing how revamped rules would solve whatever congestion problems presently affect the Port. Nor does Bi-State provide any compelling reasons why the Commission should be the only meaningful forum for proper recourse of their transportation-related complaints. Other than stating the general fact that the Commission has jurisdiction over MTOs under the Shipping Act, Bi-State merely presents a tangential discussion on how truck idling at ports is a major cause of pollution and how States' air quality legislation (namely California) will "murky the waters of port congestion regulation." Petition at 20-21, 23-26.

Contrary to Bi-State's position, opponents state that detention payments to truckers will not increase terminal efficiency and that Bi-State's focus on MTOs is misdirected. UMS argues that rising cargo volumes and the competitive market for terminal services in the Port provide enough incentive for MTOs to increase capacity and throughput. UMS Comments at 4. PNCT avers that if the marketplace paid truckers on an hourly basis rather than a per-load basis, Bi-State would have no economic interest in the self-imposition of truck delay penalties by MTOs in the Port. PNCT Comments at 8. NYTC agrees, asserting that Petitioners are requesting that the Commission

order a compensation increase from the terminal rather than seek one from their customers. NYTC Comments at 18.<sup>4</sup>

Finally, Bi-State offers no compelling information to show that the Port is suffering from unique circumstances that would distinguish it from other large U.S. ports in such a way that special truck detention regulation is warranted. In fact, because its evidence on this particular issue includes California ports, it is unclear whether Bi-State is asking the Commission to promulgate truck detention rules directed at terminals solely in the Port or in all ports nationwide.

Bi-State has not established sufficient facts to warrant reconsideration of the Commission's 1994 decision to abrogate the former truck detention rules. In its 1994 final rule, the Commission essentially created a check list of evidence that would be considered compelling in truck detention penalty cases. Free Time and Demurrage Charges on Import Property At the

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"Opposing commenters had also contended that Bi-State's roadability concerns would be better addressed by the Department of Transportation Federal Motor Carrier Safety Administration, which was considering a rulemaking on intermodal equipment interchange and maintenance. On December 31, 2003, the FMCSA withdrew its Advance Notice of Proposed Rulemaking due to insufficient data to support the continuation of the proceeding. See Withdrawal of Advance Public Rulemaking, 68 Fed. Reg. 75478 (2003). Docket No. FMCSA-98-3656, General Requirements: Inspection, Repair and Maintenance: Intermodal Container Chassis and Trailers, 67 Fed. Reg. 71127. On January 26, 2004, Transportation Secretary Norman Y. Mineta announced that the Department of Transportation plans to launch an intermodal container chassis safety inspection program. A Notice of Proposed Rulemaking for this program has not yet been issued.

Port of New York; Truck Detention at the Port of New York, 59 Fed.Reg. 13459 (Final Rule 1994). Bi-State does not address this checklist and instead provides arguments concerning matters outside the Commission's jurisdiction, such as pollution. Opponents' submissions, coupled with the lack of substantive support from the shipping public, suggest that there is no need for Commission intervention at this time. Accordingly, the Commission denies the Petitioner's request to reconsider the promulgation of truck detention regulations.

#### B. Statutory Authority

The Petition's opponents contend that the Commission lacks jurisdiction altogether over the allegations in the Petition. If this allegation were correct, it would be unnecessary for the Commission to reach the question of whether Bi-State has supplied adequate factual support to justify an investigation. The commenters' argument, however, is erroneous. The Commission retains statutory authority under the 1984 Act to address the practices at issue here. Because neither Petitioner nor the commenters have correctly articulated the basis for the Commission's jurisdiction, we take this opportunity to clarify the issue.

The Shipping Act grants the Commission personal jurisdiction over MTOs, defined, in part, as "person[s] engaged in the United States in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702 (14). NYTC concedes that it is a conference of MTOs, therefore the Commission has personal jurisdiction over it. NYTC Comments at 2.

As for subject matter jurisdiction, the Commission must determine whether the truck detention rules promulgated by NYTC relate to or are connected with “receiving, handling, storing or delivering property” under section IO(d)(l) of the Shipping Act. The Commission’s decisions in A.P. St. Philip v. The Atlantic Land and Improvement Co., 13 F.M.C. 166 (1969) (“A.P. St. Philip”), and Petchem, Inc. v. Canaveral Port Authority, 23 S.R.R. 974 (1986), provide useful guidance in making such a determination.’

In A.P. St. Philip, violations of sections 15, 16, and 17 of the 1916 Act were alleged against respondent, the lessor of a phosphate elevator facility. The Commission ascertained that it must find personal jurisdiction under section 1 and subject matter jurisdiction under section 17 of the 1916 Act in order to have complete jurisdiction over respondent.<sup>6</sup> While respondent stated

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<sup>5</sup>For further clarification of MTO jurisdiction, see the recent order issued in Canaveral Port Authority - Possible Violations of Section 1 0(b)(10), Unreasonable Refusal to Deal or Negotiate, and Exclusive Tug Arrangements in Port Canaveral, Florida, 29 S.R.R. 1455 (2003).

‘Section 1 was carried over, as modified in its current form, as section 3(14) of the Shipping Act of 1984. That section stated in relevant part:

The term “other person subject to this Act” means any person not included in the term “common carrier by water in interstate commerce” carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate commerce.

(continued...)

it was an MTO under section 1, the Commission also found personal jurisdiction due to the lessor's control over the elevator facility through a contract with a towing company to exclusively provide all towing services at the elevator facility. 13 F.M.C. at 166. The Commission found that if an entity retains control over a terminal, that entity is "furnishing terminal facilities" and is therefore a marine terminal operator. The Commission applied the same analysis regarding its subject matter jurisdiction pursuant to section 17, and concluded that the furnishing of tug services at the facility transformed tug services into a terminal function related to "receiving, handling, transporting, storing or delivering of property." Id. at 172.

In Petchem, a section 10(d)(1) violation (among others) was alleged against respondent Canaveral Port Authority ("CPA") for its operation of a tug franchise system. Upon a finding of personal jurisdiction over the port's operation of the tug franchise system, the Commission then held that CPA's practices had an underlying purpose relating to terminal operations and "a more than incidental relationship to the receiving and handling of property and cargo." 23 S.R.R. at 987. Accordingly, the Commission found that it had jurisdiction over the matter.

In view of the rationale from those holdings, the Commission finds that it has subject matter jurisdiction over this matter. It has been established that NYTC is a conference of MTOs with control over their respective terminals, furnishing terminal facilities. The truck detention rules promulgated by

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<sup>6</sup>(...continued)

As explained earlier, section 17 was carried over, as modified in its current form, as section 10(d)(1).



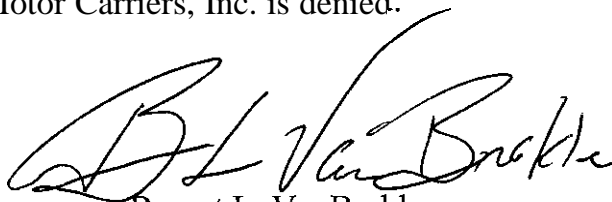
NYTC under its Tariff are integral to the loading and unloading of cargo from common carriers, the interchange of containers and chassis, and the ultimate delivery of property for shippers. As such, we conclude that the promulgation of truck detention rules at the relevant facilities is a terminal function related to “receiving, handling, storing or delivering property” as provided in section 10(d)(l) of the Shipping Act.

### **CONCLUSION**

The Commission denies the Petition of the Association of Bi-State Motor Carriers, Inc. for failure to establish sufficient facts to warrant the initiation of an investigation under Rule 69 of the Commission’s Rules of Practice and Procedure. Likewise, the Commission denies Bi-State’s request for reconsideration of the 1994 decision to eliminate truck detention penalty requirement from the regulations.

THEREFORE, IT IS ORDERED, That the Petition of the Association of Bi-State Motor Carriers, Inc. is denied.

By the Commission.

A handwritten signature in black ink, appearing to read "Bryant L. VanBrakle". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Bryant L. VanBrakle  
Secretary